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CLERK, U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
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24, 2013), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, defendant is neither a creditor in the underlying bankruptcy case, nor was defendant sufficiently active in the case to give rise to a finding of a waiver of defendant's right to an Article III adjudication. Accordingly, the court does not have authority to enter a final judgment on the fraudulent transfer claim asserted against defendant. Thus, the court submits the following as its findings of fact and conclusions of law, together with its recommendation, to the district court.¹

ANALYSIS

A summons and complaint were served on defendant, who failed to answer within the time provided under FED. R. BANKR. P. 7012(a). On May 17, 2013, the clerk of the court entered an order of default against defendant. There are no other defendants in this matter. Accordingly, the well-pleaded allegations in plaintiff's complaint, except for allegations

¹ In sum, § 157(b) (1) provides bankruptcy courts the power to hear fraudulent [transfer] cases and to submit reports and recommendations to the district courts. Such cases remain in the core, and the § 157(b) (1) power to 'hear and determine' them authorizes the bankruptcy courts to issue proposed findings of fact and conclusions of law. Only the power to enter final judgment is abrogated. Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553, 565-66 (9th Cir. 2012), *cert. granted*, 2013 WL 3155257 (June 24, 2013).

1 regarding the amount of damages, are deemed admitted. FED. R.
2 Civ. P. 8(b)(6).

3 Obtaining a default judgment is a two-step process. See
4 Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986) . First,
5 the clerk of the court enters the default of the party who has
6 failed to plead or otherwise defend; the clerk or the court,
7 depending on the nature of the plaintiff's claim, then enters a
8 default judgment. FED. R. CIV. P. 55(a) and (b), incorporated
9 herein by FED. R. BANKR. P. 7055. In this case, the clerk, at
10 the request of plaintiff, entered the default of defendant on
11 May 17, 2013. Plaintiff's motion is for entry of default
12 judgment against defendant, pursuant to FED. R. Civ. P. 55(b).
13 Factors the court must consider include the following: (1) the
14 possibility of prejudice to the plaintiff; (2) the merits of
15 plaintiff's substantive claim; (3) the sufficiency of the
16 complaint; (4) the sum of money at stake in the action; (5) the
17 possibility of a dispute concerning material facts; (6) whether
18 the default was due to excusable neglect; and (7) the strong
19 policy underlying the Federal Rules of Civil Procedure favoring
20 decisions on the merits. Eitel, 782 F.2d at 1471-72. Resolution
21 of disputes on their merits is generally favored over default
22 judgments. See id. at 1472.

23 Similar, albeit differently articulated, considerations are
24 involved in the context of a court's exercise of discretion to
25 set aside a default judgment:

26 These considerations, are usually listed as (1)
27 whether the default was willful or culpable; (2)
28 whether granting relief from the default would
prejudice the opposing party; and (3) whether the
defaulting party has a meritorious defense. Such

1 considerations are, therefore, also appropriate
2 considerations when deciding whether to render a
3 default judgment. This is
4 logical. When faced with the decision concerning
5 whether to render a default judgment in the first
6 place, a court logically should consider whether
7 factors are present that would later oblige the court
8 to set that default judgment aside.

9 10 MOORE'S FEDERAL PRACTICE § 55.31[2] (Matthew Bender 3d. ed.
10 2012) .

11 Pursuant to the Fourth Claim for Relief of the First
12 Amended Complaint, plaintiff alleges a fraudulent transfer claim
13 under 11 U.S.C. § 548 (a) (1) (A). In particular, plaintiff
14 alleges that debtor, Vincent Singh ("Singh"), made four payments
15 to defendant totaling \$27,800.00. The payments consisted of
16 cash, checks, or other forms of transfer directly from Singh or
17 indirectly from one or more accounts in Singh's name, Malanie
18 Singh, Perfect Financial Group, Inc., AAMCO Stockton, Inc.,
19 AAMCO Orangevale, Inc., OM L. Singh, John A. Singh, Usha D.
20 Singh, and/or third parties to or for the benefit of defendant.
21 The payments were made as part of a Ponzi scheme perpetrated by
22 Singh. Defendant had invested funds with Singh and received
23 payments in connection with the amounts invested. Although Singh
24 represented that he was making "hard money" loans that would
25 produce funds to be paid back to investors (including
26 defendant), the actual source of the payments from Singh was
27 funds invested by other investors.

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1 **A. Propriety of Entering Default Judgment (Eitel Factors)**

2 **1. Possibility of Prejudice to Plaintiff**

3 Plaintiff will be prejudiced if default judgment is not
4 granted. Plaintiff, as trustee of a bankruptcy estate being
5 administered in part for the benefit of Ponzi scheme victims, is
6 required to marshal a series of transfers to numerous investors
7 so that each investor can receive his or her aliquot share of
8 investment funds misappropriated by the perpetrator of a Ponzi
9 scheme. Although it seems counterintuitive to claw back funds
10 redistributed to the victims by Singh, it is necessary in
11 ensuring the equality of treatment of similarly situated
12 creditors.

13 Defendant's failure to respond in this action presents a
14 delay that reverberates through the bankruptcy case: plaintiff
15 is prevented from marshaling and accounting for investment funds
16 that are to be distributed on a pro rata basis. Accordingly,
17 plaintiff will be prejudiced.

18 **2. The Merits of Plaintiff's Claims**

19 The following facts are taken as true given defendant's
20 lack of response. As stated earlier, plaintiff's complaint
21 alleges, inter alia, a claim under 11 U.S.C. § 548(a) (1) (A)
22 that the transfers to defendant were made by Singh with an
23 actual intent to hinder, delay, or defraud defendant and other
24 similarly situated creditors. The court agrees with plaintiff
25 that Singh's conduct amounted to a Ponzi scheme, which is
26 sufficient to establish actual intent to defraud creditors
27 within the meaning of 11 U.S.C. § 548(a) (1) (A). The "existence
28 of a Ponzi scheme is sufficient to establish actual intent under

1 § 548(a)(1)." AFI Holding, Inc. v. Mackenzie (In re AFI
2 Holdings, Inc.), 525 F.3d 700, 704 (9th Cir. 2008) (internal
3 quotation marks omitted).

4 Plaintiff's complaint adequately alleges that Singh engaged
5 in a Ponzi scheme. In furtherance of this scheme, Singh accepted
6 investment funds from defendant and other similarly situated
7 investors. From time to time, Singh, whether directly or
8 indirectly, distributed payments to the investors as an illusory
9 return on investment. These illusory returns constitute
10 transfers of an interest in property of the debtor within the
11 meaning of 11 U.S.C. § 101(54)(D). The well-pleaded facts show
12 that these transfers were made with an actual intent to hinder,
13 delay, or defraud defendant on or within 2 years before the date
14 of the filing of the petition. Therefore, plaintiff's fourth
15 claim for relief is meritorious.

16 Although an exception to liability exists in 11 U.S.C. §
17 548(c) for a defendant who takes in good faith and gives new
18 value, the defendants' good faith is an affirmative defense
19 under Section 548(c) which must be pleaded in the first instance
20 as a defense by the defendants. It is not incumbent on the
21 plaintiff to plead lack of good faith on the defendants' part
22 because lack of good faith is not an element of a plaintiff's
23 claim under Section 548(a)(1)." Bayou Superfund, LLC v. WAN
24 Long/Short Fund II, L.P. (In re Bayou Grp., LLC), 362 B.R. 624,
25 639 (Bankr. S.D.N.Y. 2007). As defendant has not filed a
26 response in this action, defendant has not met the burden of
27 proof required to successfully assert a "good faith" defense to
28 plaintiff's fraudulent transfer claim.

1 Lastly, plaintiff's complaint adequately alleges that
2 plaintiff is entitled to recover the transfers made to
3 defendant. "[T]o the extent that a transfer is avoided under
4 section . . . 548, . . . the trustee may recover, for the
5 benefit of the estate, the property transferred. . . from— (1)
6 the initial transferee of such transfer or the entity for whose
7 benefit such transfer was made." 11 U.S.C. § 550(a)(1).
8 Therefore, plaintiff's fifth claim for relief is meritorious.

9 **3. Sufficiency of Plaintiff's Complaint**

10 The court finds that plaintiff's complaint is well-pleaded
11 and sets forth plausible facts—not just parroted statutory or
12 boilerplate language—that show that plaintiff is entitled to the
13 relief sought in the fourth and fifth claims for relief. The
14 complaint sufficiently alleges with particularity facts that
15 show Singh engaged in an extensive Ponzi scheme of which
16 defendant was a victim. Pursuant to the scheme, defendant
17 invested funds and also received certain transfers from Singh.

18 The court is satisfied that plaintiff has pleaded the
19 circumstances of the Ponzi scheme constituting actual fraud with
20 particularity. See FED. R. BANKR. P. 7009, which incorporates
21 FED. R. CIV. P. 9(b) (requiring a party who alleges fraud to
22 plead such fraud with particularity) Moreover, plaintiff has
23 pleaded facts that satisfy the elements of a fraudulent transfer
24 claim sounding in actual fraud.

25 **4. The Amount at Stake**

26 Defendant is liable to plaintiff for a sum of money
27 received via at least two transfers from Singh. The total amount
28 of avoidable transfers alleged is \$27,800.00, subject to change

1 if and when plaintiff discovers other transfers made to
2 defendant. The amount at stake is not a grossly large number,
3 nor is it a nominal amount. Plaintiff has presented evidence
4 showing that Singh made at least two payments to defendant in
5 the amount alleged. This factor weighs in favor of a default
6 judgment.

7 **5. Possibility of Dispute as to Material Facts**

8 Upon entry of default, all well-pleaded facts in the
9 complaint are taken as true, except allegations relating to
10 damages. Defendant has not advanced any arguments showing
11 material facts in dispute. Given the sufficiency of the
12 complaint and defendant's default, there is no genuine dispute
13 of material fact that would preclude a default judgment.

14 **6. Excusable Neglect**

15 Defendant was properly served with the summons and
16 complaint pursuant to FED. R. BANKR. P. 7004. It is therefore
17 unlikely that defendant's failure to respond to the complaint
18 was due to excusable neglect.

19 **7. Policy in Favor of Deciding on the Merits**

20 "Cases should be decided upon their merits whenever
21 reasonably possible." Eitel, 782 F.2d at 1472. As compelling a
22 factor as this may be, a decision on the merits is not
23 reasonable in light of defendant's complete inaction.
24 Defendant's lack of a response renders a decision on the merits
25 practically impossible. Thus, the ordinary preference to decide
26 cases on the merits must yield to the granting of a default
27 judgment.

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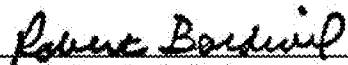
B. Damages

The entry of a default judgment establishes the liability of the defaulting party but the moving party still must establish the amount of damages. Geddes v. United Fin. Grp., 559 F.2d 557, 560 (9th Cir. 1977). "A court does not abuse its discretion by failing to hold a hearing [on damages] when the amount of damages is liquidated or can be made certain by computation based on the pleadings or information in the existing record." 10 MOORE'S FEDERAL PRACTICE § 55.32[2] [b] .

In recommending an award of damages here, the court relies on the copies of checks submitted as evidence by plaintiff. The total amount of transfers, according to this evidence, is \$27,800.00.

For the reasons stated, the court recommends entry of a default judgment in favor of plaintiff, with damages in the amount requested in the complaint.

Dated: May 15, 2014



Robert S. Bardwil, Judge
United States Bankruptcy Court